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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

UNITED STATES OF AMERICA, *Appellant,*

v.

PARAMOUNT PICTURES, INC. ET AL., *Appellees.*

Appeal from the District Court of the United States for the
Southern District of New York.

BRIEF AS AMICUS CURIAE.

**SUBMITTED IN BEHALF OF THE CONFERENCE OF
INDEPENDENT EXHIBITORS' ASSOCIATIONS.**

ABRAM F. MYERS,

*Counsel for the Conference of
Independent Exhibitors' Associations,
729 Fifteenth Street, N. W.,
Washington 5, D. C.*

TABLE OF CONTENTS.

| | Page |
|--|------|
| I. Independent Exhibitors Have a Vital Interest in the Outcome of the Case | 1 |
| 1. Their vulnerable position | 1 |
| 2. Impact of defendants' theatre monopoly | 3 |
| 3. Impact of defendants' film monopoly | 5 |
| 4. Impact of the lower court's decree | 8 |
| 5. The independent exhibitors are rendering a valuable public service and should be protected | 11 |
| II. The Competitive Bidding System Prescribed by the District Court is Unauthorized, Unworkable, Ineffective and Mischievous | 13 |
| 1. It is unauthorized by the Sherman Act | 13 |
| 2. It is utterly unworkable | 17 |
| 3. It is wholly ineffective | 19 |
| 4. It will be mischievous in its effects | 21 |
| III. The Competitive Bidding Plan if Retained for Any Purpose or Any Length of Time Should Be Fortified by Additional Remedies and Made More Workable by Amendments | 23 |
| 1. If the plan has any value, it is only as interim partial relief pending divestiture .. | 23 |
| 2. In order to make immediately available the benefits of divestiture, the bidding system should be accompanied by a ban on cross-licensing | 24 |
| 3. Competitive bidding to be comparable must be on a flat rental basis | 25 |
| 4. Bidding on a flat rental basis will eliminate the evil incidents of percentage playing | 26 |
| 5. Additional amendments are required to make the system workable | 28 |
| IV. Defendants Deal with the Independent Exhibitors Only Upon Long, Complicated and Well-nigh Uniform Contract Forms, Devised in Their Own Interest and Almost Wholly Lacking in Mutuality | 29 |

| | |
|---|----|
| 1. Defendants' license agreements taken together and in their entirety constitute a uniform method of doing business | 29 |
| 2. Defendants' license agreements are uniform and non-competitive in virtually all particulars | 31 |
| 3. The continuing conspiracy among the defendants is shown by substantially uniform revisions of the contract forms | 36 |
| V. Outline of an Effective Final Decree, Consistent with the Sherman Act, Respectfully Submitted for Consideration in Framing the Mandate to the District Court | 38 |
| 1. "The extension of such measure of relief as will effectually dissolve the combination found to exist" | 38 |
| (a) Divestiture | 38 |
| (b) The remedy is not extreme | 39 |
| (c) The defendants possess and have exercised the power to dictate runs, clearances, admission prices and other details of theatre operation, and that power has been exercised to the detriment of the public and the injury of the independent exhibitors | 41 |
| (d) All connections between the producer-distributors and their theatres should be terminated and the future independence of the theatres assured | 44 |
| (e) Defendants should be required to dispose of their holdings in jointly-owned theatres and should not be permitted to buy out their co-owners | 45 |
| (f) Pending disposition of defendants' theatre interests provision should be made for adequate interim relief in the form of a ban on cross-licensing | 46 |

Contents Continued.

iii

| | Page |
|--|------|
| 2. "To forbid the doing in the future of acts like those which have been done in the past which would be violative of the statute". | 46 |
| (a) An injunction against the practice of discrimination in the licensing of films should be included | 47 |
| (b) All injunctive provisions of the lower court's decree except Sec. II (8) and Sec. III (5) are appropriate and should be affirmed | 47 |
| 3. The burden of enforcing compliance with the decree should not be cast upon the independent exhibitors by arbitration or otherwise | 48 |

CASES CITED.

| | |
|---|-------|
| American Tobacco Co. v. United States, 221 U. S. 106, 55 Law Ed. 662 | 21 |
| Bigelow v. RKO Radio Pictures et al. (C. C. A. 7th) 150 Fed. 2d. 877 | 4 |
| Bigelow v. RKO Radio Pictures et al., 327 U. S. 251, 90 Law Ed. 652 | 4, 10 |
| Continental Insurance Co. v. United States et al., 259 U. S. 156, 56 Law Ed. 871 | 40 |
| Continental Insurance Co. v. United States et al., Order for re-argument, 257 U. S. 622, 56 Law Ed. 402 .. | 40 |
| Federal Trade Commission v. Klesner, 274 U. S. 145, 71 Law Ed. 972 | 13 |
| Goldman v. Loew's, Inc. et al., (D. C. En. Pa.) 54 Fed. Supp. 1101 | 4 |
| Goldman v. Loew's, Inc. et al. (C. C. A. 3d) 150 Fed. 2d 738 | 4, 6 |
| International Salt Company v. United States, No. 46, decided Nov. 10, 1947, Adv. Ops. Law Ed. Vol. 92, No. 2, p. 55 | 47 |
| Interstate Circuit, Inc. v. United States, 306 U. S. 208, 83 Law Ed. 610 | 37-38 |
| Klein v. Board of Tax Supervisors, 282 U. S. 19, 75 Law Ed. 140 | 9 |

| | Page |
|---|-----------------|
| Paramount Famous Lasky Corp. et al. v. United States, 282 U. S. 30, 75 Law Ed. 145 | 5, 6, 29, 41-42 |
| RKO Radio Pictures et al. v. Bigelow (C. C. A. 7th) 162 Fed. 2d (Adv.) 520 | 4, 10 |
| RKO Radio Pictures et al. v. Bigelow, Certiorari de- nied, Nov. 10, 1947, Law Ed. Adv., Vol. 92, No. 2, p. 79 | 10 |
| Paramount Pictures, Inc. et al. v. Langer, Attorney General, 23 Fed. Supp. 890 | 43-44 |
| Paramount Pictures, Inc. et al. v. Langer, Attorney General, Order of reversal for lack of actuality, 306 U. S. 619, 83 Law Ed. 1025 | 43 |
| Schenley Distillers Corp. v. United States, 326 U. S. 432, 90 Law Ed. 181 | 9-10 |
| Standard Oil Company et al. v. United States, 221 U. S. 1, 55 Law Ed. 619 | 14, 21, 38, 46 |
| United States v. Crescent Amusement Co., 323 U. S. 173, 89 Law Ed. 160 | 4, 11 |
| United States v. First National Pictures, Inc. et al., 282 U. S. 44, 75 Law Ed. 151 | 30, 33 |
| United States v. International Harvester Co., 274 U. S. 693, 71 Law Ed. 1302 | 21- |
| United States v. National Lead Company, No. 89, Oct. Term, 1946, Order entered Oct. 17, 1947, Adv. Ops. Law Ed. Vol. 92, No. 1, p. 26 | 38-39 |
| United States v. Paramount Famous Lasky Corp. et al. (D. C. Sn. N. Y.) 34 Fed. 2d 984 | 29, 35 |
| United States v. Paramount Pictures, Inc. et al. (this case below) 70 Fed. Supp. 53 | 5, 6, 23 |
| United States v. Reading Company et al., 253 U. S. 26, 64 Law Ed. 760 | 39-41, 44 |
| United States v. Schine Chain Theatres et al. (D. C. Wn. N. Y.) 63 Fed. Supp. 229 | 4 |
| United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 Law Ed. 1007 | 12-13, 21 |
| United States v. Union Pacific R. R. Co., 226 U. S. 61, 57 Law Ed. 124 | 45 |
| United States v. Union Pacific R. R. Co., 226 U. S. 670, 57 Law Ed. 306, Order on form of mandate | 45 |
| United States v. United States Steel Corp., 251 U. S. 417, 64 Law Ed. 343 | 21 |

OTHER CITATIONS.

| | |
|--|-------|
| Constitution, Art. I, Sec. 8 | 13 |
| Report of Senate Interstate Commerce Committee on Neely Anti-Block Booking Bill, June 15, 1938, S. Rep. 2378, 74th Cong. 2d Sess. | 11 |
| Temporary National Economic Committee, Monograph No. 21, "Competition and Monopoly in American Industry" | 48-49 |
| Temporary National Economic Committee, Monograph No. 26, "Economic Power and Political Pressure" .. | 49 |
| Temporary National Economic Committee, Monograph No. 43, "The Motion Picture Industry, a Pattern of Control" | 49 |

STATUTE.

| | |
|--|----|
| Sherman Anti-Trust Act, Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Ch. 1 | 13 |
|--|----|

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BRIEF AS AMICUS CURIAE.

**SUBMITTED IN BEHALF OF THE CONFERENCE OF
INDEPENDENT EXHIBITORS' ASSOCIATIONS.¹**

I.

**INDEPENDENT EXHIBITORS HAVE A VITAL INTER-
EST IN THE OUTCOME OF THIS CASE.**

1. Their vulnerable position. The independent motion picture exhibitors (i.e. independent of producer-distributor ownership, operation or influence) have a stake in this litigation second to none.

¹ The Conference consists of 26 national and regional associations of independent motion picture exhibitors. It was formed primarily to represent the independent exhibitors in this litigation. The constituent associations are listed in the petition for leave to file this brief.

It is not going too far to say that whether or not they remain in the motion picture business depends largely upon the outcome of this case and the nature of the final decree to be entered.

While large in number, the independent exhibitors nevertheless occupy a vulnerable position. They are dependent upon the eight major producer-distributors—the defendants herein—for necessary supplies of quality films with which to operate their theatres. To the extent that they operate in the same competitive areas with the affiliated theatres,² they are competitors as well as customers of the theatre-owning producer-distributors and are treated as such. And even where the independents do not now compete with the affiliated chains, they must live in dread that their areas may be invaded. Moreover, the pattern of conduct of all the defendants, whether or not they now operate theatres, is to discriminate in favor of the affiliated theatres and against the independents, as revealed by the opinion and findings of the lower court.

To fully appreciate the precarious position of the independent exhibitors, it is necessary to distinguish between the methods by which the motion picture business is conducted and those which prevail in other industries. Each film is copyrighted, it can be obtained only from the distributor releasing it, it cannot be duplicated elsewhere. An independent exhibitor cannot walk into one of the defendants' film exchanges, select the films he wants and exhibit them at his pleasure. Whether he may have a film for exhibition on first, second, third, or fourth run in a competitive area, the amount of time that shall elapse between the preceding run and the one granted him, and many other details including when and how he may advertise and how much he shall charge, rest in the discretion of the distributor. And the distributor is under no compulsion to license

² Theatres owned, controlled or operated by one or more of the five theatre-owning defendants, or in which they have an interest.

a film to the exhibitor on any run or on any terms, unless it is so minded.

2. Impact of defendants' theatre monopoly. Under these conditions the five theatre-owning defendants (Paramount, Loew's, 20th Century-Fox, Warner Bros. and RKO) have been able to acquire and maintain a virtual monopoly of the large city first-run theatres, and to acquire and maintain a virtual monopoly of all classes of theatres in certain areas. As an illustration, we cite the situation in Washington with which the Court may possibly be familiar. There are six downtown theatres which exhibit major company feature length films on a first run policy. Of these the Capitol, Palace and Columbia³ are operated by defendant Loew's, Inc.; the Warner (formerly Earle) and Metropolitan⁴ are operated by defendant Warner Bros.; and RKO Keith's is operated by defendant RKO. In addition, Warner Bros. operates 20 neighborhood theatres in Washington and its environs.⁴

The lower court sought to minimize this monopoly condition by comparing the total number of affiliated theatres with the total number of independent theatres. This indicated that the defendants together control only about 17.35 per cent of the motion picture theatres in the United States. But such a comparison can have relevancy only upon the theory that every theatre in the United States competes with every other theatre—a patent absurdity. The court passed over lightly the numerous territorial monopolies re-

³ The Columbia and Metropolitan are sometimes used for move-overs. A move-over is an extended first-run, the film being transferred from the first-run to the move-over theatre without any intervening time lapse. (Rodgers, Steno. Minutes, Oct. 23, 1945, pp. 553-555.)

⁴ Ambassador, Apollo, Avalon, Avenue Grand, Beverley, Calvert, Central, Colony, Home, Kennedy, McArthur, Penn, Savoy, Seco, Sheridan, Silver, Takoma, Tivoli, Uptown and York. (Warner Bros. Theatres' advertisement regularly appearing in the Washington Post and the Washington Evening Star.)

vealed by the Government's proof and which are illustrated by the decisions in *Goldman v. Loew's, Inc. et al.* (D. C. En. Pa.), 54 Fed. Supp. 1191, (C. C. A. 3d) 150 Fed. 2d 738; and *Bigelow v. RKO Radio Pictures et al.* (C. C. A. 7th), 150 Fed. 2d 877, 162 Fed. 2d (Adv.) 520, (U. S. Sup. Ct.) 327 U. S. 251, 90 Law Ed. 652. And it failed to apply to defendants' territorial monopolies the principles of *United States v. Crescent Amusement Co.*, 323 U. S. 173, 89 Law Ed. 160 and *United States v. Schine Chain Theatres et al.* (D. C. Wn. N. Y.), 63 Fed. Supp. 229.

Moreover, the lower court in shrugging off defendants' theatre monopoly gave no weight to the superior size, importance, influence and earning power of the prior-run affiliated theatres in contrast to most independent theatres. All first-class films must filter through the prior-runs to the subsequent-run theatres. If there is delay in exhibiting the pictures on first-run, the subsequent-runs must wait for the product. Thus when a dispute arose between Paramount as a distributor and Loew's as an exhibitor in New York City, Paramount's releases were withheld from the subsequent-runs in that area for a period of eight months while the difficulty was being adjusted. (Reagan, Sten. Min. Oct. 24, 1945, pp. 776-777.) Hence, the subsequent-runs in a very real sense operate by sufferance of the prior-runs.

Finally, the lower court, in holding that it is "unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly . . . that they should be subjected to the drastic remedy of complete divestiture," overlooked one of its most important findings of fact. Defendants' theatres by reason of their size, location, priority of run, high admission prices and other advantages, provide almost one-half of the total film revenue derived from the domestic market. Finding No. 126 reads, in part, as follows:

The 17.35 per cent of theatres which comprise the five circuits of the major defendants^a pay from 35 to 54 per cent of the total domestic film rental respectively received by the eight distributor defendants and 45 per cent of the total domestic film rental received by all of said distributor defendants.

It is against these powerful circuits that the widely scattered and individually weak independent exhibitors must bid for films, runs and clearance if the Government's plea for divestiture is denied and the lower court's regulatory system is affirmed. Moreover, new producers and distributors without the stimulus of free access to this tremendous prior-run revenue cannot be expected to enter the field in competition with the eight major producer-distributors.

The continuance in business of the independent exhibitors can be assured, and the way opened for new sources of product, only by the complete separation of production and distribution from exhibition.

3. Impact of defendants' film monopoly. In *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 75 Law Ed. 145, decided by this Court in 1930, the finding was that the ten companies there involved were "producers and distributors throughout the Union of 60 per cent of the films used for displaying motion pictures by some twenty-five thousand theatre owners" (p. 36).⁶

The opinion of the lower court in the present case shows that "during the 1943-1944 season the eight defendants dis-

^a In the lower court the five theatre-owning defendants became known as the "majors" and the other three defendants as the "minors." This is at variance with the parlance of the trade in which the defendants are all known as major companies and are sometimes called the "Big Eight." The terms "minor" and "independent" are reserved for such small organizations as Monogram and Republic.

⁶ These companies were Paramount, First National, M-G-M (Loew's), Universal, United Artists, Fox, Pathe, FBO, Vitagraph, Educational.

tributed about 77.6 per cent of all features nationally distributed except 'westerns' and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5 per cent." The court further said that "The control of distribution closely resembles that appearing in *Goldman Theatres, Inc. v. Loew's Inc.* (C. C. A. 3d), 150 Fed. 2d 738," and quoted the following from the opinion in that case:

Defendants control the production and distribution of more than 80% of feature pictures in the country, and no exhibitor can successfully operate without access to defendants' product.⁷

The lower court's findings do not account for the shrinkage in the total number of major distributors since 1930. Notwithstanding the accession to the ranks of the majors of Columbia (which was not involved in the *Paramount Famous Lasky Case*), the total has shrunk from 10 to 8. However, Findings Nos. 35 to 37, inclusive, show that defendant Warner Bros. acquired First National Pictures, Inc. and Finding No. 38 shows that Vitagraph is a wholly-owned subsidiary of the same defendant. Finding No. 19 shows that defendant RKO absorbed FBO Productions, Inc. and we do not believe it will be disputed that RKO also absorbed Pathe Exchange, Inc.

Neither do the findings reflect the gradual reduction in the number of feature films annually released by the defendants. Finding No. 99 shows that during the 1943-1944 season the eight defendants together released 260 feature films, exclusive of "westerns." The affiliated first-run and key neighborhood theatres by reason of extended runs (a "smash hit" will sometimes be held over for three or four weeks) and move-overs, do not require as many feature pictures as the independent subsequent-run and small town theatres. Theatres of the latter class commonly change

⁷ Actually the *Goldman Case* involved only seven of the eight major distributors, Universal having been eliminated by agreement.

their programs two or three times a week, thus requiring from 104 to 156 features a year. Most of them are compelled by competitive conditions or custom to show double features; that is two feature pictures on every program. And in many instances the exhibitor must split the available product with a competitor having the same run.

It is apparent, therefore, that so far as the independent subsequent-run and small town theatres are concerned, there is a serious product shortage. This has the effect largely to destroy the bargaining power of the independent exhibitors in licensing film from the defendants. If an independent exhibitor does not like the terms demanded and conditions imposed by one of the defendant distributors for its products, he is in no position to reject the offer and apply to another distributor in hopes of securing a better bargain. That is why the defendants have been able to foist upon the independent exhibitors their onerous, one-sided and well-nigh uniform contract forms, to insist upon percentage deals which make the distributors partners in the theatre for the duration of the engagement, and to fix the admission prices to be charged, check the box office receipts and generally to exercise dominion over the independent theatres.³

With their own theatres adequately supplied with films, the theatre-owning defendants have no incentive to produce more in order to strengthen the position of the independent exhibitors. The non-theatre-owning defendants, which derive so large a part of their total film rentals from the affiliated theatres, are reluctant to jeopardize that revenue by catering to the independents. With approximately 50 per cent of their domestic film rental assured by their affiliated accounts, all defendants can out-last the independent exhibitors whenever a stalemate is reached in bargaining for films.

³Defendants' uniform contracts and forced percentage playing will be dealt with elsewhere in this brief.

The establishment of an elaborate system of competitive bidding for films, as proposed by the lower court, will not relieve but will aggravate the impact of the film monopoly upon the independent exhibitors. The true remedy is theatre-divorcement, thereby opening the screens of the affiliated theatres to new producers and new distributors, with new ideas, skills and talents to enter into competition with the Big Eight. The requirement of the Sherman Law and the function of the courts, we submit, is to restore competitive conditions and permit free enterprise to have its sway; not to erect complicated machinery for the regulation of competition.

4. Impact of the lower court's decree. The court below did not find the ownership and operation of theatres by the defendant producer-distributors to be inherently wrong or illegal. But it did find it illegal for the defendants to own or operate theatres jointly with one another or with others. And thus it arrived at the extraordinary conclusion that greater evil resides in the partial ownership of theatres than in total ownership. Accordingly, the court ordered that such joint ownerships be terminated in all cases where defendants' interest is more than 5 per cent and less than 95 per cent, leaving a 5 per cent tolerance at each end.

Had the requirement been that the defendants dispose of all such joint interests to third parties or to the independent interests involved, it would have been moderately impressive. But the order merely was that the relationships be terminated "by a sale to, or *purchase from* the co-owner or co-owners, or by a sale to a party not one of the defendants." (Decree, Sec. III, Par. (5), italics ours.) As hereinafter explained, such dispositions are to be made pursuant to the direction of the court.

And so the decree in conformity with the opinion is directed not at the ownership and operation of theatres *per se*, but is merely aimed at joint ownership.

Even if we indulge the assumption that the District Court, despite the sentiments expressed in its opinion, will

take a strong stand against permitting the defendants to buy out their independent partners, the defendants nevertheless will retain a majority of their present theatres including most, if not all, of their metropolitan first-runs, which are "wholly-owned."

By Sec. IV of the decree it is provided that the defendants shall have the unlimited right "to license, or in any way arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of 95 per cent or more either directly or through subsidiaries."

If the defendants owned their theatres in fee and operated them directly, thereby assuming all the hazards of theatre operation, there might be some justification for the District Court's ruling that they are entitled to play their own films in their own theatres on whatever terms they please. But the defendants rarely, if ever, own or operate theatres directly; that is done through subsidiary corporations. Sec. IV of the decree, above-quoted, nullifies the doctrine of separate corporate identity—not to give effect to a clear legislative purpose, but to defeat the will of Congress as expressed in the Sherman Act. "It leads nowhere to call a corporation a fiction", said Mr. Justice Holmes in *Klein v. Board of Tax Supervisors*, 282 U. S., 19, 24, 75 Law Ed. 140, 143. And he continued:

If it is a fiction, it is a fiction created by law with intent that it should be acted on as true. The corporation is a person, and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members.

The law on this subject was summed up in the *Per Curiam* opinion in *Schenley Distillers Corp. v. United States*, 326 U. S. 432, 436-437, 90 Law Ed. 181, 184:

While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose; they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the state lays upon it for the protection of the public.

It is noteworthy that the decree entered by the District Court for the Northern District of Illinois in the *Bigelow Case* subsequent to the decision of this Court (327 U. S. 251, 90 Law Ed. 652), which decree was affirmed by the Court of Appeals for the 7th Circuit (162 Fed. 2d (Adv.) 520, and which this Court declined to review on certiorari by an order entered November 10, 1947 (Law Ed. Adv. Vol. 92, No. 2, p. 79), contained, *inter alia*, a provision restricting the run of pictures in the distributors' downtown first-run theatres to two weeks, and made no exception as regards the playing of their own pictures in their own theatres.

As a substitute for the obviously effective remedy of complete divestiture,⁹ and as a judicial cure-all for the evils set forth in its opinion and findings, the court provided that all theatres, whether distributor-owned or independent, shall bid competitively for films, theatre by theatre and picture by picture, in all competitive areas. (Decree Sec. II, Par. (8).)

The utter unworkability of the bidding system as blue printed by the District Court will be dealt with under a subsequent heading. For the time being it will suffice to point out that it would pit the lone independent exhibitor

⁹ The lower court in its opinion conceded that "Undoubtedly such a step (divestiture) while not *ipso facto* preventing price-fixing agreements or unreasonable clearance, would terminate the Government's most urgent objections to the present methods of conducting the motion picture business."

against the marshaled strength of the distributor-owned chains, with their backlogs of parent company products, in bidding for films; that while this would enable the independent to bid for runs and clearances now enjoyed by the affiliated chains, it also would invite those chains to bid away the favorable runs and clearances which a few independents now receive from non-theatre-owning distributors; that the final and inevitable result would be to run up the price of film, if not, indeed, to enlarge the defendants' theatre monopoly.

5. The independent exhibitors are rendering a valuable public service and should be protected. Under the conditions outlined under the four preceding subheads, the independent exhibitors, with a few exceptions, have been relegated to neighborhood and suburban subsequent-runs in the large cities and to the small towns and rural communities.¹⁰ Even so, they are rendering an important service, catering to the "family trade" and especially to child theatre-goers. They bring entertainment and relaxation to those who need it most, through a medium that combines drama, literature, music and scenic beauty, and at a price they can afford to pay.

In selecting pictures—to the extent that selectivity is vouchsafed to him—the independent exhibitor, as a member of the community in which he operates, is best qualified to know and meet the needs and preferences of his patrons. "Community preference" in motion picture entertainment which is the goal of numerous public groups interested in prohibiting the block-booking and blind-selling of films, can best be achieved through the local independent exhibitors.¹¹

¹⁰ This excludes the large so-called independent circuits such as Crescent, Schine and Griffith, whose power and business practices are not unlike those of the affiliated chains. This Court already has ruled upon Crescent (323 U. S. 173) and cases involving Griffith and Schine are now pending before it.

¹¹ Report of Senate Interstate Commerce Committee on Neely Anti-Block-Booking and Blind-Selling Bill, dated June 15, 1938, S. Rep. No. 2378, 74th Cong., 2d Sess. "The logical and only readily available point of contact between the motion picture industry and the community is the exhibitor."

That ideal is impossible of attainment through chain operated theatres, where the ultimate responsibility for film buying and other operating policies affecting the public is vested in home office executives often far removed from the communities served.

The Government did not see fit to offer oral testimony to dramatize the effects of the defendants' business policies and practices upon the independent exhibitors. The record is silent as to how many independent exhibitors sold out voluntarily to the affiliated chains or how many sold out reluctantly because the favored runs, clearance protection and many other advantages were being conferred upon the affiliated theatres and they realized that they could not compete under those conditions. Nevertheless, the lower court in its opinion found that "both independent distributors and independent exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs and admission prices to which they have been obliged to conform" And under the heading "Discrimination Among Licensees" it found that the competitive advantages conferred upon the affiliated theatres constituted "an unreasonable discrimination against small competitors in violation of the anti-trust laws."

These findings are amply justified by the proof and establish that defendants have the power to exclude independent distributors and independent exhibitors from the more lucrative runs and ultimately from the business. They also show that defendants' policies and practices are adapted to bring about such exclusion. It is only a question of degree; possibly a matter of time. In the meantime, the growth of existing independents is stunted and there is little encouragement for new ones to come in. Such conditions, we submit, are contrary to the purpose and ideals of the Sherman Act. In Mr. Justice Peckham's philosophical opinion in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 41 Law Ed. 1007, written when the statute was fresh upon the books, we find a passage which,

despite its age, is peculiarly appropriate to the circumstances of this case. Speaking of combinations having the power to eliminate competitors through the medium of price control, he said (p. 324):

In this light it is not material that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

II.

THE COMPETITIVE BIDDING SYSTEM PRESCRIBED BY THE DISTRICT COURT IS UNAUTHORIZED, UNWORKABLE, INEFFECTIVE AND MISCHIEVOUS.

1. It is unauthorized by the Sherman Act. One utterance of the late Justice McReynolds in which all may join is that "judicial legislation is a hateful thing."¹² The decree in this case presents a glaring example of usurpation of the power of Congress. The constitutional grant of power to regulate commerce among the several states was to Congress, not to the courts.¹³ Enactment of the Sherman Act¹⁴

¹² Separate opinion in *Federal Trade Commission v. Klesner*, 274 U. S. 145, 71 Law Ed. 972.

¹³ Constitution, Art. I, Sec. 8.

¹⁴ Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Ch. I.

was an exercise by Congress of the power thus vested in it. By Sec. 4 Congress conferred upon the Federal Courts "jurisdiction to prevent and restrain violations of this Act." That marks the extent of the Court's authority to remedy violations of the law in civil actions brought by the Government.

Of course, jurisdiction to prevent and restrain violations implies the exercise of discretion in the choice of an appropriate remedy. But the remedies chosen must be found within the boundaries of the judicial function and must be consistent with the language and purposes of the statute. This Court in *Standard Oil Company v. United States*, 221 U. S. 1, 77, 55 Law Ed. 619, 652, delimited the appropriate measures of relief in civil actions by the Government under the Sherman Act, as follows:

... the application of remedies two-fold in character, becomes essential:

1st. To forbid the doing in the future of acts like those which have been done in the past which would be violative of the statute.

2d. The extension of such measure of relief as will effectually dissolve the combination found to exist ...

The express provisions of the act, the foregoing precepts and a due regard for constitutional limitations called for a decree divesting the defendants of their theatres and enjoining them from further employing the unfair, restrictive and discriminatory practices which the District Court had denounced. Instead, that Court, *sua sponte*, conceived and prescribed a plan requiring all exhibitors in all competitive areas, independent and affiliated alike, to bid competitively for films desired for exhibition on any particular run.⁹ The defendants were enjoined from hereafter licensing any feature film for exhibition in any theatre not its own, otherwise than in accordance with that plan. Operation of this provision of the decree was suspended by Mr. Justice Reed pending disposition of these appeals.

The plan is set forth in Sec. II, Par. 8 of the decree of the District Court. It is difficult to grasp without a background of experience in the motion picture business. The following outline, for purposes of clarity, is broken down into short paragraphs the designations of which, however, do not correspond to those of sub-paragraphs of the decree.

(a) A license to exhibit each feature released by a defendant for public exhibition in any competitive area shall be offered to the operator of each theatre in the area who desires to exhibit it on some run¹⁵ selected by such operator and upon uniform terms.¹⁶

(b) Where a run is desired or is to be offered upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify the exhibitors in the area not less than 30 days in advance of the date when bids will be received, offering to license the features on one or more runs,¹⁷ and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run.

(c) Within 15 days after receiving such notice, any exhibitor in the area may bid for such license, and in his bid

¹⁵ Except, of course, a run pre-empted by the distributor for its own "wholly owned" theatre.

¹⁶ This paragraph apparently contemplates simultaneous exhibition by all theatres in the area, without distinction as to run.

¹⁷ The following definitions are from Finding No. 1 of the District Court:

Runs—The successive exhibitions of a feature in a given area, first run being the first exhibition in that area, second run being the next subsequent, and so on and shall include also successive exhibitions in different theatres, even though such theatres may be under a common control and management.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

shall state what run he desires and what he is willing to pay for such feature, "*which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make.*" (Italics ours.)

(d) "*The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor.*" (Italics ours.)

(e) Each license shall be granted solely upon the merits without discrimination in favor of affiliates, old customers, or others.

(f) Each license shall be offered and taken theatre by theatre and picture by picture.

By Section II, Par. 9 of the decree the defendants were enjoined from *arbitrarily* refusing the demand of an exhibitor who is in competition with another theatre (not owned by a defendant, or its affiliate or subsidiary), dispatched by registered mail, to license a feature to him for exhibition on the run selected by him, instead of licensing it to the competing exhibitor on such run. Presumably if an exhibitor believes he has been arbitrarily refused a picture on the requested run, and the distributor accords him no satisfaction, he can complain to the Attorney General in the hope that the latter will initiate a contempt proceeding.

While the plan is couched in the language of an injunction, and the defendants are enjoined from doing business in competitive areas except in accordance with it, the plan manifestly is not an appropriate Sherman Act remedy but is a regulatory system applicable to the guilty and innocent

alike, which, under our form of government, only Congress is empowered to impose. Had the Congress intended that the motion picture industry should be regulated in this way, it would have so provided by special legislation, and it doubtless would have provided for the administration of such legislation by an appropriate agency such as the Federal Trade Commission. No such legislative intent can be gleaned from the Sherman Act.

2. It is utterly unworkable. The slogan of the entertainment business is, "The show must go on." As applied to the movies this means that the theatres must be assured of a steady flow of films, they must be booked well in advance of their opening dates, advertising trailers must be run while preceding attractions are shown and newspaper and other advertising must be arranged for in advance. Exhibitors, like publishers, are governed by deadlines. The "hurry, hurry, hurry" of the old tent show barker is the rule of life of the modern exhibitor.

Prior to the abortive and now lapsed provisions of the consent decree, the defendants other than United Artists¹⁸ offered their films, with a few exceptions, in yearly "blocks." Under this block-booking system the exhibitor was required to license the distributor's output for a year, sight unseen. These practices were known as compulsory block-booking and blind-selling. Under the consent decree, the five consenting defendants¹⁹ were required to license their features in blocks of not more than five. That provision was in effect only for the 1941-1942 season. But since then those defendants, for the most part, have continued to hold trade shows and to follow the five-picture plan.²⁰ Co-

¹⁸ This is purely a distributing organization and it did not usually link together the productions of different producers. It sometimes "blocked" the productions of the same producer. Lazarus, Sten. Min. Nov. 1, 1945, pp. 1410-1414.

¹⁹ Paramount, Loew's, 20th Century, Warner Bros. and RKO.

²⁰ Rodgers, Sten. Min. Oct. 23, 1945, pp. 550-552.

lumbia and Universal have continued to sell on a yearly basis.²¹ Under the lower court's competitive bidding plan all defendants will have to offer their products, in competitive areas, "theatre by theatre and picture by picture."

Charles M. Reagan, Vice-President in Charge of Sales for defendant Paramount, testified that subsequent-run theatres sometimes make two or three changes a week, and use double bills, requiring 156 to 204 pictures a year.²² Under the lower court's plan, the offers to receive bids must go out 30 days in advance of the bidding, and the award must be made within 15 days thereafter; so that the harassed exhibitor would have to bid for pictures anywhere from 156 to 204 times a year and would endure in each instance a "sweating out" period of 45 days in which he would not know whether he was going to get the picture or not. Thus would the normal operations of the industry be completely bound up in red tape.

If the plan would, as the lower court believes, eliminate discrimination and the other evils revealed by the proof, it is probable that the exhibitors would endeavor with hearty good will try it out. But the plan is as full of holes as a yard of mosquito netting. In the first place, it permits exhibitors to bid in terms of "a flat rental, or a percentage of the gross receipts, or both, or any other form of rental . . . and any other offers such exhibitor may care to make." It is obvious that the affiliated chain theatres will take advantage of the latitude thus given them to offer bids which could not possibly be compared with others in the amount of revenue to be derived and thus open the way for the perpetuation of the very discriminations which the plan is designed to cure. There are too many speculative factors to permit of an exact comparison of bids.

²¹ Montague, Sten. Min. Oct. 31, 1945, pp. 1257-1259, 1312-1320. Sometimes for more than a year. Scully, Do., pp. 1458-1459; sometimes for two or three seasons p. 1485.

²² Reagan, Oct. 25, 1945, p. 820. Even first-runs sometimes use 52 or more a year (id.).

For example, there are numerous complicated combinations of percentage playing, but for present purposes we may take the relatively simple case of a straight percentage deal. Theatre A might offer to pay 35 per cent of the gross receipts, Theatre B 40 per cent, for the same picture; but there would be no assurance that Theatre B's bid would yield a larger film rental than A's. The size and location of the respective houses, the admission prices charged, the extent to which the theatre advertised the picture, the caliber of the exhibitor's showmanship, and the suitability of the picture for the theatre's type of audience—these and many other factors would enter into the equation.

In any case, the amount of the film rental to be paid could not be ascertained until after the run of the picture. The plan makes no provision for post mortems. Even if it did, such investigation could not heal the hurt that had been done the disappointed bidder.

Other unworkable aspects of the plan will be considered under the next succeeding heading.

3. It is wholly ineffective. The District Court apparently recognized the weakness in its plan discussed under the preceding heading and sought to remedy it by reserving wide discretionary powers to the defendants. Thus the distributor, with respect to any picture, may make the award to the "highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." All this is to be decided by the distributor in the exercise of its uncontrolled discretion, except as the remedy implied by Sec. II, Par. 9 of the decree may be invoked. In that event, the court would be called upon to pass upon these conditions while the film remained unplayed in the area, while public interest in it languished and it became outmoded due to style changes or otherwise.

The defendants at the trial contended that the theatres now enjoying the preferred runs are the largest, best located and equipped and yield the highest revenue and their

operators are responsible.²³ Since such testimony was necessary to minimize as far as possible the charges of discrimination, it is not surprising that it was forthcoming and, to a certain extent, it undoubtedly was accurate. But the point is that the defendants are committed to the idea that the affiliated theatres to which they have heretofore accorded the preferred runs meet all the tests of the lower court's selling plan—that they are the only ones which meet those tests—and, consequently, all questions would necessarily be resolved in their favor and against the independents in a contest for films on a preferred run.

Although the defendants are required to specify in their offers a minimum flat rental, there is no requirement that a bid of such minimum flat rental, or any bid for that matter, shall be accepted. The provision is that "the distributor may reject all offers made for any such feature." Thus the specification of a "minimum" or "upset" price is made meaningless, except as it may enable the defendants to start the bidding at a high figure in the hope that it will reach the stratosphere. Not only is the way left open for continued discrimination in favor of the great theatre circuits, but in competitions for film between independent exhibitors, the distributors by rejecting all bids offered, over and over again if they choose, can run up the price of pictures beyond anything ever before dreamed of in the fabulously opulent film industry.

But even if these loopholes were to be closed and the system patched up so that it would be workable, it still would be ineffective to accomplish its declared purpose.

²³ Rodgers, Sten. Min. Oct. 22, 1945, pp. 420-421, 443, 453, 457, 461, 476. Characteristic of Rodgers' testimony is the following:

Q. How does your theatre compare with all the others you have named?

A. I think it is the best theatre there. I think they are all the best theatres, generally speaking, except when I say there are some of them that are on a par.

Judge Bright: Even then you are being modest.

The Witness: Slightly, yes, sir. (P. 474.)

In situations in which one of the defendants owns all of the theatres which can reasonably aspire to a particular run, the situation would be unchanged. In situations where two or more of the defendants own all the theatres eligible for a particular run, it cannot be expected that they will suddenly depart from their long-continued behavior pattern and begin to compete with one another for product and runs. In situations where there are independents which might wish to bid against the distributor-owned theatres for a run, the latter, fortified by their back-logs of parent company products, will be in such a strong position that the independents cannot cope with them. The distributor-owned chains, if threatened with independent competition, will be able to over-bid for films and the losses so incurred can be recouped at points where they enjoy a monopoly. Such losses also can be offset by the simple expedient of jacking up the price of films to the independent exhibitors.

4. It will be mischievous in its effects. The most serious vice of the competitive bidding plan is that as an abortive cure-all for the evil practices of the defendants, it will have the effect to immunize their underlying monopoly and remove the legal clouds from the titles to their theatres. It should be borne in mind, although since the decision in the *Steel Case*²⁴ it appears to have been forgotten, that corporate combinations, not mere trade agreements, were the primary target of the Sherman Act.²⁵ The ineffectiveness of the decrees in the *Standard Oil* and *Tobacco Cases*²⁶ plus the rebuff in the *Steel Case* evidently discouraged further attacks on such combinations and caused attention to be

²⁴ *United States v. U. S. Steel Corp.*, 251 U. S. 417, 64 Law Ed. 343; followed in *United States v. International Harvester Co.*, 274 U. S. 693, 71 Law Ed. 1302.

²⁵ See brief reference to legislative history in *Trans-Missouri Case*, 166 U. S. 290, 319, 41 Law Ed. 1007, 1020.

²⁶ *United States v. Standard Oil Company*, 221 U. S. 1, 55 Law Ed. 619; *American Tobacco Co. v. United States*, 221 U. S. 106, 55 Law Ed. 662.

centered upon loose combinations through trade associations, patent and copyright licenses and other forms of trade agreements.

The present case affords an excellent opportunity to get back to first principles. The motion picture trust is a shining example of the kind of combination at which the Sherman Act was aimed. The District Court's attempted differentiation between total ownership and joint ownership of theatres carries to a ridiculous extreme the notion that the law applies to loose combinations and not to compact corporate combinations. It seems to imply that while the sands may be scattered the monolith is impregnable. Actually the disintegrating processes of the Sherman Act can be applied to the motion picture trust without doing violence to the bases of the decision in the *Steel Case*, because defendants' theatre chains were not forged by normal processes of integration in order to lower costs and reduce prices. By their discriminatory and monopolistic practices the defendants have made their theatres the very instruments of monopoly. The theatres have been used by defendants to reserve to themselves the playing time on the lucrative prior-runs and thus to gain a commanding advantage over all others in the production and distribution of films. By the same tactics defendants have used their theatres to stunt the growth of and to exclude independent exhibitors from such runs.

If the District Court's competitive bidding system is approved as a substitute for the traditional Sherman Act remedies of dissolution, divestiture and injunction, then defendants' distribution and theatre monopolies will be given an effective judicial immunity bath. Their retention of their "wholly-owned" theatres will bear the stamp of judicial approval. To the extent that the District Court approves the purchase by defendants of the interests of their co-owners, existing unlawful combinations will be sanctified by court action. The decree of the District Court and its subsequent approval of purchases by the defendants will constitute defendants' muniments of title.

In that event the future Bigelows, Goldmans and other independent exhibitors seeking redress for injuries inflicted upon them will find the defendants safely ensconced behind the decree. Their only remedy will be the dubious one conferred by Sec. II, Par. 9 of the decree, for arbitrary action in refusing to license a picture on the desired run; and in view of the latitude conferred upon the defendants in making awards, such arbitrary action will be difficult if not impossible to prove. And even the Government will be estopped from launching a basic attack against defendants' regional monopolies of wholly-owned theatres, whatever their future conduct may be.

III.

THE COMPETITIVE BIDDING PLAN IF RETAINED FOR ANY PURPOSE OR ANY LENGTH OF TIME SHOULD BE FORTIFIED BY ADDITIONAL REMEDIES AND MADE MORE WORKABLE BY AMENDMENTS.

1. If the plan has any value, it is only as interim partial relief pending divestiture. We have no means of knowing, at this stage, what position the Government will take in this Court with respect to the competitive bidding plan. In the District Court it filed a memorandum in which it said:

A divorcement judgment would, in our view, make unnecessary most of the provisions of the judgment with respect to the manner in which films should be licensed, except as interim relief to be in effect pending complete execution of a divorcement plan.²⁷

In this view we heartily concur. The competitive bidding system should not be saddled upon the motion picture industry as a perpetual regulation. But even if continued during the period of divestiture, the system should be but-

²⁷ Government's Memorandum in Support of Plaintiff's Proposed Supplemental and Amended Findings.

tressed by additional measures and so amended that it will be as workable as possible.

2. In order to make immediately available the benefits of divestiture, the bidding system should be accompanied by a ban on cross-licensing. "Plaintiff's Proposed Judgment" submitted by the Government to the District Court contained a paragraph looking to immediate effective relief. The proposal, however, was rejected by that Court. It asked that the five theatre-owning defendants be enjoined—

(8) From licensing for exhibition in any theatre owned or controlled by it films distributed or produced by another defendant named in this section which is not affiliated with it, for a period commencing one year after the entry of this decree and continuing for a period of not less than ten years. At the conclusion of said period, any party may move to modify this provision in any manner which the facts then appearing to the Court may warrant.

This would effectually prevent the theatre-owning defendants from monopolizing the available products on the runs which they now enjoy. At the same time it would reserve to the theatres of each the products of the parent company plus an open field in which to compete for the products of the three non-theatre-owning defendants and existing independent and minor company products and the products of new companies which may enter the field. It would pave the way for new sources of product and would allow a more equitable distribution among all classes of exhibitors of the products presently available.

The Conference of Independent Exhibitors' Associations respectfully submits that an injunction against the cross-licensing of films, similar to that above quoted, is a necessary concomitant of any competitive bidding system. Without it, the competitive market envisioned by the District Court as a result of the bidding system can never be attained. Only by such measure can the great disparity in

strength of the affiliated chains and the independent exhibitors be equalized for bidding purposes.

More important than this from the standpoint of the public interest, a ban on cross-licensing would open the screens of the prior-run theatres to new producers and distributors and provide the incentive for them to engage in the business. A major fallacy of the District Court is the implicit assumption that a product shortage is the normal state of the motion picture industry—that exhibitors must always engage in a life and death struggle for the limited supply. The normal state of any healthy industry is that the supply is equal to the demand. The Sherman Act fosters competition among producers and sellers as well as among buyers. The purpose and value of such competition is that it serves to improve the quality of the products and to hold down prices.

A ban on cross-licensing for a period of ten years would provide substantial relief even though imposed as a substitute for complete divestiture. Any claim by the theatre-owning defendants that they cannot operate their theatres without cross-licensing one another must stand as an admission (a) of the magnitude of their distribution monopoly and (b) the feebleness of the competition of the independent prior-runs in the metropolitan areas which rarely have more than one of the Big Five products and often have none.

3. Competitive bidding to be comparable must be on a flat rental basis. The District Court, in its opinion, held that its ruling against price-fixing "does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means." And, as we have already seen, an exhibitor in bidding for films may specify whatever pricing formula he sees fit. Under Chapter II, Section 2 of this brief, *supra*, pp. 18-19, we have demonstrated the

utter impossibility of comparing bids on a percentage basis in order to ascertain which is highest.

The District Court unwittingly admitted this fatal defect in its competitive bidding plan. In explanation of its failure to find discrimination on the part of the defendants with respect to film rentals, clearances or minimum admission prices, the Court said: "They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions, such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of the operators." At another point, the Court declared against so-called "overages" and "underages" in the adjustment of film rentals between the defendants and the affiliated theatres because "under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed"—overlooking for the nonce the patent fact that the amount payable under a percentage engagement cannot be determined until the completion of the run.

Without yielding any of the positions heretofore taken in this brief, and against the contingency that the bidding system might be put into operation, the Conference of Independent Exhibitors' Associations respectfully requests that the words of Sec. II, Par. 8 (c) of the decree permitting bidding in terms of percentages be stricken and that there be included in that paragraph the following sentence:

Each bid considered and each license granted shall be for a flat sum and not upon a percentage basis.

4. Bidding on a flat rental basis will eliminate the evil incidents of percentage playing. Inclusion of the above-suggested provision in the decree will render unnecessary certain provisions of the bidding plan which are pertinent only to percentage deals. Since flat rentals are payable on the barrel head no fiduciary relationship is created and there is

no occasion to weigh the "responsibility" of the bidders. Also it is a matter of no consequence whether the highest bidder has a theatre "adequate to show the picture on such run." The injection of such considerations almost certainly will serve as a cloak for the perpetuation of defendants' discriminatory practices.

While the lower Court condemned and ordered terminated the joint ownership of theatres between the theatre-owning defendants and other exhibitors, it took no notice of the forced partnerships with independent exhibitors resulting from defendants' insistence upon percentage playing. This practice is not confined to the theatre-owning defendants, it is engaged in by all. Elimination of percentage playing would make really effective the provisions against joint ownerships by terminating defendants' other theatre partnerships which are secured and enjoyed without any investment in the theatres and without sharing the hazards of the venture. The exhibitor, not the distributor, must carry the overhead on percentage engagements.

In addition, adoption of the foregoing suggestion would eliminate from the business a number of monopolistic and vexatious practices which the defendants have imposed upon the independent exhibitors as adjuncts of the percentage system. The extent of the control over the independent theatres which the defendants enjoy as the result of percentage playing are set forth in the well-nigh uniform provisions of the license agreements (exhibition contracts) of the defendants, numerous copies of which were received in evidence. Among these are the fixing of admission prices, the checking of box office receipts, the auditing of exhibitors' accounts and records, and the designation of the day or days of the week on which the pictures shall be played.

Defendants' general sales managers were frank in stating their reasons for preferring percentage arrangements to flat rental deals. It enables them to get higher film rentals and affords them an insight into the exhibitors' busi-

ness.²⁸ Motion picture films admittedly are not priced so as to recoup production and distribution costs and earn a reasonable profit. It is a question of what the traffic will bear, and the checking of receipts and auditing of accounts tell the defendants all they need to know to accomplish their purpose. It must be remembered that the independent theatres over whose business such strict surveillance is maintained quite frequently are in competition with defendants' theatres. This lends point to a fact brought out during the cross-examination of the witness Montague: That five of the defendant distributors—Columbia, RKO, Paramount, Universal and United Artists—have formed and now employ a jointly owned agency, called Confidential Reports, Inc., for checking the exhibitors' box office receipts.²⁹

5. Additional amendments are required to make the system workable. Again without yielding our position, we respectfully propose the following amendments to the bidding plan with a view to enhancing its workability against the day that it might possibly go into effect.

(a) *Time and manner of bidding.* To prevent uncertainty and manipulation, the bids should be submitted within 10 days after the offer has been made. They should be opened at 2 p. m. on the 11th day thereafter (excluding Sundays and holidays) and made available to the inspection of the bidders on that day. This will reduce the "sweating out" period and conduce to a freer flow of product.

(b) *National release date.* In order to overcome territorial discriminations and otherwise to add definiteness to

²⁸ Reagan, Sten. Min. Oct. 23, 1945, pp. 698-699; Kupper, Sten. Min. Oct. 29, 1945, pp. 1082-1083; Montague, Sten. Min. Oct. 31, 1945, pp. 1321-1322; Mochrie, Sten. Min. Nov. 2, 1945, pp. 1722-1723.

²⁹ Montague, Sten. Min. Oct. 31, 1945, p. 1322. We do not think it will be disputed that since that time 20th Century and Warner Bros. have joined in the arrangement.

the system, it is respectfully suggested that the distributors be required to announce a national release date for each picture they intend to license and to offer the picture in all territories within a definite uniform time thereafter.

(c) *Successive licensing of runs.* Unless successive runs are licensed successively, a subsequent-run exhibitor who is the unsuccessful bidder for a prior-run may be deprived of the opportunity to bid on that picture for his customary run. The alternative to offering the runs successively would be to permit an exhibitor to submit alternate bids; but this might result in clogging the system with infirm bids or, worse yet, saddling upon an exhibitor binding contracts for two or more runs for the same picture.

IV.

DEFENDANTS DEAL WITH THE INDEPENDENT EXHIBITORS ONLY UPON LONG, COMPLICATED AND WELL-NIGH UNIFORM CONTRACT FORMS, DEvised IN THEIR OWN INTEREST AND ALMOST WHOLLY LACKING IN MUTUALITY.

1. Defendants' license agreements taken together and in their entirety constitute a uniform method of doing business: Between May 1, 1928 and the date of the final decree in *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 75 Law Ed. 145 the major motion picture distributors (enumerated in a footnote on p. 5 of this brief) used a standard form of license agreement. The history of that standard form is set forth in the opinion of District Judge Thacher in that case. *United States v. Paramount Famous Lasky Corp.*, 34 Fed. (2d) 984. For present purposes it will not be necessary to search out the genesis of the standard exhibition contract. It will suffice to quote the following from the decision of this Court:

The record discloses that ten competitors in interstate commerce, controlling 60 per cent of the entire film business, have agreed to restrict their liberty of

action by refusing to contract for display of pictures except upon a standard form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with any distributor, all with the manifest purpose to coerce the exhibitor and limit the freedom of trade. (P. 41.)

However, that case turned upon the compulsory arbitration clause of the standard agreement and the uniform rules of arbitration, and the result was merely to eliminate from the standard form the arbitration clause. A companion case, *United States v. First National Pictures, Inc. et al.*, 282 U. S. 44, 75 Law Ed. 151, condemned only a system adopted by the major distributors for enforcing the observance of contracts by the purchaser of a theatre; i.e. the assumption of his predecessors' obligations. And the District Court in the present case merely held illegal the price-fixing clauses of the exhibition contracts (now called license agreements) and made no finding or ruling in reference to the numerous uniform and restrictive provisions of the forms now in use. Under "Discrimination Among Licensees" the lower court did, however, enumerate the many preferences and advantages granted by the defendants to the affiliated theatres and withheld from the independents, and said:

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres . . . Small independent theatres are usually licensed, however, upon the standard forms of contract which do not include them.

While defendants deny that they today use a standard license agreement, the resolution of the question depends not upon their protestations but upon a comparison of their contract forms. These were offered in evidence but were not reprinted in the record, presumably because of their great bulk. While admittedly a laborious task, we strongly feel that the Court cannot adequately grasp the full extent

and effect of defendants uniform tactics in dealing with the independent exhibitors without, first, a comparison of the contract forms used by the several defendants in licensing their pictures to the independents, and second, a comparison of the form used by each for the 1936-1937 season with the form used by it for the 1943-1944 season.

These contract forms are identified as follows:

| Defendant | Form No. | Season | Received | Gov't. Ex. No. |
|----------------|--------------|-----------|----------------|-------------------|
| 20th Century | La. 838 | 1936-1937 | Vol. I, p. 273 | 275 |
| 20th Century | E. 901 | 1943-1944 | Vol. I, p. 273 | 276 |
| Loew's | 851-D | 1936-1937 | Vol. I, p. 273 | 277 |
| Loew's | 1177 | 1943-1944 | Vol. I, p. 273 | 278 |
| Paramount | 3840-D-5-36 | 1936-1937 | Vol. I, p. 273 | 279 |
| Paramount | A340 A3 | 1943-1944 | Vol. I, p. 273 | 280 |
| RKO | 5352 B | 1936-1937 | Vol. I, p. 273 | 281 |
| RKO | 5456 Rev. | 1943-1944 | Vol. I, p. 274 | 282 |
| Warner | 90 WF 36-37 | 1936-1937 | Vol. I, p. 274 | 283 |
| Warner | 90 CDT | 1943-1944 | Vol. I, p. 274 | 284 |
| Columbia | 8-14-A | 1936-1937 | Vol. I, p. 274 | 285 |
| Columbia | 8-14-F | 1943-1944 | Vol. I, p. 274 | 286 |
| United Artists | 220 B-1-37-U | 1936-1937 | Vol. I, p. 274 | 287 |
| United Artists | 220 B-3-44 | 1943-1944 | Vol. I, p. 274 | 288 |
| Universal | E-5 | 1936-1937 | Vol. I, p. 324 | 289 |
| Universal | E-5 | 1943-1944 | Vol. I, p. 274 | 290 |

2. Defendants' license agreements are uniform and non-competitive in virtually all particulars.

The license agreements consist of (a) a schedule, which is a series of blank spaces in which are entered the terms of the particular deal—the film rental, the number of days of the engagement, the run and clearance and the admission prices to be charged; and (b) the printed terms and conditions which are not subject to negotiation. It is with these printed terms and conditions that we are now concerned.

(a) The license covers only the theatre named therein—no blanket licensing as in the case of the affiliated circuits.

(b) Without exception the forms require that all fixed sums (i. e., flat rentals) payable to the distributor shall be paid at least three days in advance of delivery of the film, unless otherwise specially agreed upon.

(c) With respect to percentage engagements it is provided that payment shall be made immediately after the last exhibition date, or at the end of each day if requested by the distributor.

(d) Prior to the consent decree all defendants except United Artists sold a full season's output on a single contract form; that is, all pictures "generally released" during the season. However, roadshows, try-outs, previews and releases are declared not to constitute a "general release" and, hence, do not entitle the exhibitor to the picture.

(e) There are elaborate uniform provisions with respect to roadshows.

(f) Exhibitors are required to play pictures in the order of release unless they make special arrangements for playing all the pictures under contract with the same distributor or pay the license fees therefor in advance.

(g) No matter what promises in the way of pictures to be delivered or other inducements may have been made to the exhibitor, they are of no avail to him in case of a dispute, because each license recites, either in identical language or in substance that "This license agreement is complete and all promises, representations, understandings and agreements in reference thereto have been expressed herein,"

(h) Transportation charges on the reels and containers, both coming and going, must be paid by the exhibitor.

(i) Exhibitors are liable for the loss or damage to prints unless they can prove that the loss or damage occurred in transit.

(j) There are uniform provisions in reference to selecting playdates and rigid rules governing exhibitors in that regard.

(k) There is a uniform general provision in reference to clearance and run; and elaborate uniform provisions defining the respective rights of 1st-run, 2d-run and subsequent run exhibitors.

(l) A circuit dealing directly with the general sales manager or other company official (Rodgers, Sten. Min. I, 414-415, 417-418, 421-422; Mullin, II, 965; Kupper, III, 1187; Montague, III, 1311) knows when the negotiations are concluded that he has a firm contract. The forms show that the deal negotiated by the independent exhibitor with the film salesman or subordinate official is a mere "application for a license" subject to acceptance or rejection by the distributor's home office.

(m) The distributors shove onto the exhibitors the burden of all taxes imposed or based upon the delivery or exhibition of the films; and if the taxes are levied upon the distributor, the exhibitor must hold him harmless.

(n) The exhibitor remains liable on his contracts after the sale or transfer of his theatre even though his successor assumes the same, unless released by the distributor in writing.³⁰

(o) A subsequent-run exhibitor may not advertise a picture before or during its first run or during the immediately preceding run.

(p) There is a clause forbidding an exhibitor to cut or alter a print of any picture except a newsreel.

(q) Advertising accessories must be leased from and returned to the distributor, and newspaper advertising must feature the name of the distributor.

(r) An exhibitor may not start his show at mid-night on the first day for which the picture is licensed but must wait until 6 a. m. for the first show.

³⁰ Formerly this burden was saddled upon the successor and had to be assumed in order to license additional films. *United States v. First National Pictures, Inc.*, 282 U. S. 44, 75 Law Ed. 151.

(s) Distributors have protected themselves with ample remedies in case of a breach or default by the exhibitor, including special remedies in case an exhibitor reduces his admission price below the minimum fixed by the agreement.

(t) In some forms (but not all) it is provided that a default by the exhibitor with a particular distributor on one contract may be treated by the latter as a default on all existing contracts between it and the exhibitor.

(u) Most distributors retain the right in case of a default to deliver pictures with a C.O.D. order for all sums due. Thus an exhibitor may be compelled to yield in an honest dispute over a sum due or miss out on a booked and advertised attraction.

(v) Some require the exhibitor to hold the distributor's share on percentage engagements "in trust," segregated from other moneys.

(w) Distributors reserve the right to "designate" or "allocate" pictures to the different price brackets contained in the contract, after the contract has been signed and, usually, after the returns from the first runs have come in. This practice is known in the parlance of the trade as "blind pricing."

Of course, some of the provisions noted are merely routine and are not objectionable in themselves. As regards the provisions fixing the time within which exhibitors shall book pictures, or within which applications may be approved, or otherwise requiring the attention of the exhibitors and film exchange bookers, mere uniformity is not a vice. These substantially uniform provisions, both routine and harsh, are cited to show that defendants pursue unified tactics in dealing with the independent exhibitors; and to refute the defendants' claims that the contracts are not standardized—that there is no cooperation or understanding among them with respect to contracts. Also—and mainly—to show the harsh terms imposed upon the independent exhibitors, the lack of mutuality in their dealings

with that class of exhibitors, as contrasted with the treatment accorded the affiliated theatres under the master contracts, franchises and formula deals described by the District Court.

3. The continuing conspiracy among the defendants is shown by substantially uniform revisions of the contract forms. Of course, there could be no stronger evidence of the conspiracy among the defendants to confer monopoly privileges upon the affiliated theatres and to discriminate against the independent theatres than the master contracts, franchises and formula deals by which they license films to the affiliated theatres. These plus defendants' theatre pools were the very foundation of the decision and findings of the District Court and constitute conclusive proof of the conspiracy to monopolize the distribution and exhibition of motion pictures by granting exclusive rights and special privileges to their own theatres and the theatres of one another. But the conspiracy also is shown by the initial collusion among the defendants and others in drafting the standard license agreement³¹ and by their carefully synchronized action in amending the contract forms from time to time.

Independent exhibitors in common with the affiliated circuits (See Goldenson, *Sten. Min.* II, 842-843) do not relish having the intimate details of their business operations broadcast to the public. The distributors, all of them, have provisions in their contracts permitting them to station representatives in the theatres to check the box office receipts on percentage engagements. The employment of local checkers (i.e. persons residing in the same community as the exhibitors) was a sore spot with the exhibitors, and at the so-called 5-5-5-Conference³² the distributors agreed to insert a clause in their contracts which would eliminate

³¹ *United States v. Paramount Famous Lasky*, 34 Fed. (2d) 984.

³² See Keough, II, 929-930. It consisted of 5 distributors, 5 affiliated exhibitors and 5 independent exhibitors.

local checkers unless they were regularly employed by the distributors or were engaged as accountants. This provision will be found in the 1936-1937 forms of Columbia, 20th Century, Loew's, Paramount, RKO, Universal and Warner Bros.

Since the records available to us do not show the contracts for the intervening years, it is not possible to place the exact year in which that clause was dropped by the defendants, except as we may infer it from a circumstance heretofore mentioned, namely, the formation of Confidential Reports, Inc. as a joint checking agency. Suffice it to say that the clause is missing from the 1943-1944 contracts of all the defendants.

Again, in the 1936-1937 forms the defendants reserved the right to examine the exhibitors' books and records on percentage engagement for only a limited time after completion of the engagement—usually four months. (See 1936-1937 forms of Columbia, 20th Century, Loew's, Paramount, RKO (60 days), United Artists (one year), Universal, Warner). In the 1943-1944 forms this limitation is omitted, and the right is reserved to make an audit "at any time" after the conclusion of the engagement in the forms used by Columbia, 20th Century, Loew's, Paramount, RKO and Universal.

The 1936-1937 forms of all except Columbia contained the so-called "Confidential Clause," which was highly regarded by exhibitors. It provided that any information obtained by the distributor in the checking or auditing of percentage engagements shall be treated as confidential "excepting in any arbitration proceeding or litigation in respect to this license." The clause is missing from the 1943-1944 forms used by Loew's, Paramount, RKO and Warner.

In addition, provisions detrimental to the exhibitors have been added. The forms have long carried this clause: "If hereunder it is provided that the exhibitor make certain expenditures and/or deductions, the distributor shall have the right to examine all entries relating to such expenditures

and/or deductions." (1936-1937 forms of Columbia, 20th Century, Loew's, Paramount, RKO, Universal, Warner.) In the 1943-1944 forms of certain of the defendants (20th Century, Loew's, Paramount, RKO, Universal) this provision has been added to as follows (using 20th Century as an example):

It is further agreed that in computing Exhibitor's operating expenses any and all income (such as amounts payable to Exhibitor from renting or sub-renting space in the building where the Exhibitor's theatre is located and for screen advertising of any kind on the screen, in the theatre, etc.) during the period of the engagement of any motion picture on a participating basis shall be deducted from the Exhibitor's operating expenses.

We have heretofore shown that the distributors shove onto the exhibitors the burden of all taxes imposed or based upon the delivery or the exhibition of the films, no matter on which party the taxes are levied. A comparison of these clauses in the 1936-1937 forms with those in the 1943-1944 forms will disclose how the distributors have enlarged the same to cover new forms of taxation such as sales, gross income, storage, use, consumption, gross receipts, license, privilege, excise and compensating taxes.

The inference is irresistible that the defendants, or most of them, in eliminating from the contracts clauses favorable to the exhibitors and adding clauses favorable to themselves, were acting in concert and agreement. This uniform course of action could not have been mere coincidence—it was planned that way. It sometimes happens that two horses run a dead heat; but if from five to eight horses should come in nose-to-nose, we would suspect dirty work among the jockeys. It taxes the credulity that the defendants could so manipulate their contract forms, making uniform additions and deletions from time to time, without collusion among them.

The situation is not unlike that dealt with by this Court in *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 83

Law Ed. 610, which involved a demand by an affiliated circuit of a number of distributors that they refuse to license pictures to the circuit's subsequent-run competitors except upon the condition that the latter charge a fixed minimum admission price. The same written demand was sent to all companies, and all that sold subsequent-run theatres in the cities affected complied with the demand, but there was no proof of conspiracy among the distributors except such as could be inferred from their uniform conduct. This Court held that this was sufficient, saying:

It takes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance. (P. 223.)

V.

OUTLINE OF AN EFFECTIVE FINAL DECREE, CONSISTENT WITH THE SHERMAN ACT, RESPECTFULLY SUBMITTED FOR CONSIDERATION IN FRAMING THE MANDATE TO THE DISTRICT COURT.

1. "The extension of such measure of relief as will effectually dissolve the combination found to exist."³³

(a) *Divestiture*. Dissolution of the combination, we respectfully repeat, can only be accomplished by an order requiring the five theatre-owning defendants—Paramount, Loew's, 20th Century-Fox, Warner Bros. and RKO—to dispose of all their theatre holdings. The only precedent or passage that could be cited against complete divestiture was removed when this Court, on October 17, 1947, entered an order deleting from its opinion in *United States v. Na-*

³³ From the *Standard-Oil Case*, 221 U. S. 1, 77, 55 Law Ed. 619, 652, *supra*, p. 14.

tional Lead Company et al., No. 89, October Term, 1946, the following passage:

Existing precedents of divestiture provide examples of the restoration of a pre-existing separate status to companies or properties which have been unlawfully combined rather than to the fission of units which never have been separated . . . (Order, Adv. Ops., Law Ed., Vol. 92, No. 1, p. 26.)

This passage might have militated against an order of divestiture including such theatres as the defendants may have built, although it had no bearing on the defendants' many acquired theatres. With its deletion, the way is open for an order of complete divestiture without the necessity for distinguishing or overruling the seeming authority.

(b) *The remedy is not extreme.* Divestiture is not punitive, as the defendants argued in the District Court. It is the traditional Sherman Act remedy which has been applied to numerous other industries. Conceding, *arguendo*, that a forced sale of defendants' properties within a short space of time might inflict considerable financial loss, that is but a straw man contention, since the precedents and the experience in dissolution proceedings are against such drastic action. The practice is to allow ample time, usually stated in terms of years, in which to dispose of properties, and to make way for competition and protect the public in the meantime by appropriate injunctive provisions.

While the defendants urge their arguments of inconvenience and loss upon the Court, it will be well to bear in mind the lengths to which the courts have gone in order to insure the effective dissolution of other combinations, and to consider whether there is anything in the record in this and the numerous other cases coming before this Court involving the major motion picture producer-distributor-exhibitors which warrants unprecedented leniency toward them.

As an example, we cite *United States v. Reading Company et al.*, 253 U. S. 26, 64 Law Ed. 760, in which the District Court ordered certain restrictive clauses in mining

leases to be terminated and also that the combination between the Reading Coal Co. and the Wilkes-Barre Coal Company be dissolved. Upon appeal, this Court greatly enlarged the relief to be granted and by its mandate ordered the District Court (pp. 64-65)—

... to enter a decree in conformity with this opinion dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, existing and maintained through Reading Company, with such provision for the disposition of the shares of stock and bonds and other properties of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh & Wilkes-Barre Coal Company held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies, to the end that the affairs of all these new combined companies may be conducted in harmony with the law.

One might suppose that this sweeping order was sufficiently drastic, but in the proceedings in the District Court pursuant to mandate, a controversy arose between the different classes of stockholders of Reading Company and that dispute was carried to this Court. *Continental Insurance Company et al. v. United States et al.*, 259 U. S. 156, 56 Law Ed. 871. Upon the first argument a question arose as to whether the decree was a sufficient compliance with the opinion of this Court and the case was set for re-argument on that question and the Attorney General's attention was directed to the order. 257 U. S. 622-623, 56 Law Ed. 402.

This court found that while proper disposition had been made for divesting Reading Company of its stock interest in the several companies named, and for separating the Reading and Jersey Central railroads, and separating the Jersey Central from the Lehigh & Wilkes-Barre Coal Company, no provision had been made for breaking up the Reading Company's general mortgage which was a lien on the Reading properties, both rail and mine, and it ordered that the mortgage be broken up. Thus this Court in its zeal to insure an effective dissolution treated the general mortgage bondholders not as mere creditors, but as a cementitious element in binding the combination together.

Certainly nothing is now proposed in reference to the defendants in the present case that is nearly so drastic as was imposed by this Court, of its own motion, in the Reading Case.

(c) *The defendants possess and have exercised the power to dictate runs, clearances, admission prices and other details of theatre operation, and that power has been exercised to the detriment of the public and the injury of the independent exhibitors.* The opinion and findings of the lower court abundantly show that the defendants possess and exercise the power to dictate runs, clearances and admission prices. The well-nigh uniform exhibition contracts, to which reference already has been made, show that this control extends to virtually all theatre operating policies. It is not going too far to say that, on the basis of the evidence, defendants' entire method of doing business is illegal. In the circumstances, it is unnecessary to argue that the organization of the five theatre-owning defendants, and the business methods of all defendants, are contrary to the public interest. Detriment to the public is inherent in monopoly and monopolistic practices.

In *Paramount Famous Lasky v. United States*, 282 U. S. 30, 42-43, 75 Law Ed. 145, 150, this Court made this plain in a series of propositions, most of them being quotations from earlier decisions. Omitting the quotation marks and

citations, and stating each proposition in a separate paragraph, that decision gives effective answer to the plea of the defendants in the present case that their organization and operations are not harmful to the public—that the public will not be benefited by the application of an effective remedy.

1. Founded upon broad conceptions of public policy, the prohibitions of the statute (Sherman Act) were enacted to prevent not mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public . . .

2. The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce; in a word, to preserve the right of freedom in trade.

3. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantages called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.

4. The fact that the standard exhibition contract and rules of arbitration were evolved after six years of discussion and experimentation does not show that they were either normal or reasonable regulations.

5. . . . Congress has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. (Pp. 42-43.)

In the present case no exhibitor witnesses were called and consequently the complaints and views of the independent exhibitors are not represented in the testimony. But in the *Paramount Famous Lasky Case*, *supra*, this court rejected the distributors' contention that "the manner in which the contract and rules have worked out in

practice, and the significant absence of complaints, reflect their reasonable character"; hence the omission is by no means fatal. In this connection, the attention of the Court is respectfully invited to the decision of the United States District Court for North Dakota, consisting of Circuit Judges Sanborn and Thomas and District Judge Sullivan in *Paramount Pictures, Inc., et al. v. Langer, Attorney General, et al.*, 23 Fed. Supp. 890, in which the position of the independent exhibitors is accurately set forth. That case involved the constitutionality of a State statute making it unlawful for any producer or distributor of motion pictures to own, operate or control theatres in North Dakota. The statutory District Court, in a unanimous decision, upheld the legislation. While the case was pending in this Court on appeal, and before it could be heard, the statute was repealed. The case then being moot, and following the routine procedure, a motion was granted to reverse the judgment and to remand the case with instructions to dismiss the complaint without prejudice (306 U. S. 619, 83 Law Ed. 1025).

This development deprived the District Court's judgment of validity as between the parties but did not impair the standing of the opinion and findings as the expressions of a distinguished court in a proceeding that was very much alive at the time they were handed down. The court had held a lengthy hearing and had heard the testimony of the independent exhibitors as well as the denials of the theatre-owning producer-distributors. In its opinion the court said:

The independent exhibitors have resented and protested against the entry of the producers into the exhibition field, and have regarded their acquisition of theatres as unfair and unjust competition. The independent exhibitors believe that the acquisition and operation of motion picture theatres by the major producers has created a situation which, if permitted to continue, may eventually destroy the independent theatre operators, and leave the theatres affiliated with producers in virtually complete possession of the field.

of exhibition. The defendants introduced evidence showing the extent and nature of the controversy which has existed between the independent exhibitors and the producer-distributors owning theatres, which tends to prove that the independent theatre owner is at a disadvantage in competition with affiliated theatres. The producers, on the other hand, deny that they have been guilty of any unfair practices in the distribution of their films, or of any attempts to acquire a monopoly in the business of exhibition either in North Dakota or elsewhere; and their evidence tends to sustain their contentions in that regard.

And as regards the extent of the power held by the theatre-owning producer-distributors and their exercise of that power, the court said:

A producer having affiliated theatres has the power to grant to its theatres the right to exhibit first run all pictures produced by it. It has the power to grant to its theatres greater clearance than to their competitors. Its bargaining power for the pictures of other producers which have affiliated theatres is greater than that of a competing independent exhibitor, because producers operating theatres must purchase pictures from each other, and each of such producers owns many theatres. A producer which owns theatres has the power to make it impossible for the independent exhibitor to procure films from it, and difficult to procure them from other major producers in case the producer-exhibitor desires those films for itself. There is evidence tending to show that producers with affiliated theatres have exercised the powers possessed by them for their own advantage and to the detriment of their independent competitors.

(d) *All connection between the producer-distributors and their theatres should be terminated and the future independence of the theatres assured.* While this Court in the *Reading Case* adopted extreme measures to insure the complete separation and future independence of the combined properties, this was in reality a logical outgrowth of the dissatisfaction with the abortive decree in the *Standard*

Oil Case, which dissatisfaction was first judicially expressed by this Court in rejecting the proposed decree in *United States v. Union Pacific Railroad Company*. This Court ordered the combination brought about by Union Pacific's acquisition of stock in the Southern Pacific dissolved. 226 U. S. 61, 57 Law Ed. 124. The Attorney General then offered a motion as to the form of the mandate to insure that there would be no attempted dissolution by merely distributing the stocks of the subsidiary among the stockholders of the parent company, thus leaving both corporations under the control of the same individuals. 226 U. S. 670, 57 Law Ed. 306. This Court upheld the Attorney General, saying:

We are of opinion, however, and now hold, that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this Court to be entered.

Therefore, it is respectfully suggested that the mandate to the District Court in this case should emphasize that the divestiture shall be total and complete and that the future independence of the now affiliated theatres shall be assured. It is possible that the proceedings on mandate in the District Court may disclose that the defendants are dominated by a comparatively few powerful personages, some closely connected by consanguinity or affinity, some engaged in production and distribution and others in operating theatres. This condition, if developed, will call for the exercise of the greatest care in formulating an effective decree.

(e) *Defendants should be required to dispose of their holdings in jointly-owned theatres and should not be permitted to buy out their co-owners.* Section III, par. 5, will be unnecessary and inappropriate if complete divestiture is granted. However, if total divorcement is not granted, and this provision is retained, then it surely should be

amended by striking out the language which would allow a defendant, with the approval of the District Court to terminate a joint ownership by buying out its co-owner.

The notion that a violation of the Sherman Act resulting from the joint ownership of property by a member of the trust and an independent can be cured permitting the trust to buy out the independent surpasseth understanding. It cannot be the purpose of the Sherman Act to require that the partial ownership of property by a violator shall be transformed into total ownership by judicial order. In offering this proposal, we disclaim any purpose to attribute bias to the District Court (notwithstanding its rather warm defense of theatre ownership) or to predict that it would permit the defendants to buy out their independent co-owners in any considerable number of cases. We merely wish to point out (a) that the order is contrary to the theory and purpose of the Sherman Act and (b) that the District Court, in passing upon the defendants' applications to buy out their partners, would be deciding upon the merits of each separate situation standing alone and not on the acquisition in its relation to the general combination.

(f) *Pending disposition of defendants' theatre interests provision should be made for adequate interim relief in the form of a ban on cross-licensing.* This point already has been developed on pages 23-25 and is mentioned under the present general heading because a ban on cross-licensing is necessary to bring immediately into play the forces of competition and hence to provide effective relief during the time required to effect divestiture. It is an essential part of any effective order in the present case.

2. "To forbid the doing in the future of acts like those which have been done in the past which would be violative of the statute."³⁴

³⁴ From the Standard Oil Case, *supra*, p. 14.

(a) *An injunction against the practice of discrimination in the licensing of films should be included.* The District Court's findings are adequate to support a sweeping injunction against discrimination in the licensing of film. Such an injunction is the simple, direct, effective solution of the problem created by defendants' favoritism toward the affiliated theatres and other large buyers and their discrimination against the independent exhibitors. The inclusion in the decree of such an injunction would make unnecessary the elaborate competitive bidding plan put forward by the District Court. Ample precedent for an injunction of this kind is found in the recent decision of this Court in *International Salt Company v. United States*, No. 46, decided November 10, 1947, Adv. Ops., Law Ed., Vol. 92, No. 2, p. 55, more especially the passages dealing with Par. VI of the decree there involved. A similar provision, fashioned to conform to the peculiarities of the motion picture business, would cure the more flagrant violations set forth in the District Court's opinion and findings without saddling upon the entire industry, guilty and innocent alike, a burdensome, unworkable and ineffective competitive bidding system.³⁵

(b) *All injunctive provisions of the lower court's decree except Sec. II 8 and Sec. III 5 are appropriate and should be affirmed.* Sec. II 8, relating to competitive bidding should be stricken for reasons hereinbefore set forth; and Sec. III (5), if retained, should be amended in the manner proposed on pages 25-26. All other injunctions contained in the decree are appropriate, will be effective and should be affirmed. Certain of the injunctions provided in Sec. III, especially Paragraphs (2), (3), (4), (6) and (7) will be-

³⁵ For example, a paraphrase of Par. VI of the *Salt Decree* would read as follows: "Each distributor defendant is directed to offer for license any feature motion picture which is then being or about to be offered by such defendant in the United States to any exhibitor applying therefor on non-discriminatory terms and conditions." The provisos to Par. VI are inapplicable to the licensing of films.

come academic once complete divestiture is accomplished. However, they should be in effect during the process of divestiture. This is especially true of Par. (6), enjoining the defendants from expanding their theatre holdings in any manner whatsoever (except as permitted by the District Court under Sec. III (5)). In the absence of total divestiture, this provision is vital to the protection of the independent exhibitors.

3. The burden of enforcing compliance with the decree should not be cast upon the independent exhibitors by arbitration or otherwise. The improvident consent decree entered in the District Court on November 20, 1940, gave the independent exhibitors a limited right to institute arbitration proceedings for the redress of certain grievances. The provisions were so restricted and inadequate that the system was practically useless except in clearance cases; and even here, under the rulings of the Appeal Board, the remedy was doubtful and uncertain. But we do not deem it appropriate to enter into a discussion of the several arbitrable provisions of the consent decree or to analyze the decisions of the Appeal Board. Such arbitration system could not be imposed by the Court without the consent of the parties to the suit, and in the District Court the Government withdrew its consent.

Arbitration as provided by the consent decree is dead, and we earnestly hope it will remain that way.

Nevertheless, the District Court insisted to the end that the arbitration system be retained by consent of the parties. It is our hope that this Court will not be influenced by the lower court's views on this point. Wholly aside from the inadequacy of the system to afford relief, and without reference to the rulings in arbitration cases, we feel that the final decree should be enforced (if enforcement is necessary) by the Attorney General and the Courts, not by the independent exhibitors.

The Temporary National Economic Committee, in its Investigation of Concentration of Economic Power issued a

series of Monographs dealing with the motion picture monopoly. In Monograph No. 21 "Competition and Monopoly in American Industry," pp. 172-173 there is a passage dealing with motion pictures and in Monograph No. 26, "Economic Power and Political Pressures," pp. 182-183 there is another. Monograph No. 43, "The Motion Picture Industry—A Pattern of Control" is entirely devoted to motion pictures.³⁶

Appendix III to Monograph 43 treats of the Consent Decree in this case and says, in part:

Ordinarily, enforcement of a consent decree is assumed by the Department of Justice. When the Department feels that a provision of a decree has been violated, the Department can ask that the violator be adjudged in contempt of court and request that an appropriate penalty be imposed. It appears that in this case the Department has specifically resigned these powers. Enforcement of the decree is instead imposed on the members of the industry and to a considerable extent on the weaker members of the industry. (P. 84.)

Respectfully submitted,

ABRAM F. MYERS,
*Counsel for the Conference of
 Independent Exhibitors' Associations*
 729 Fifteenth Street, N. W.,
 Washington 5, D. C.

December 15, 1947.

³⁶ These references are to the Senate Committee prints which bear a foreword by Chairman O'Mahoney to the effect that the views expressed are those of the author and not necessarily those of the Committee. The Committee, however, was ably staffed and the reports are based on painstaking investigation and research. Their findings and conclusions are cited for their intrinsic merits.